Filed 3/9/10 P. v. Martin CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. KENNETH RAY MARTIN, Defendant and Appellant.	2d Crim. No. B211480 (Super. Ct. No. PA059600) (Los Angeles County)

Kenneth Ray Martin appeals the judgment entered after a jury convicted him of first degree burglary (Pen. Code,[1] § 459), assault with intent to commit rape during the commission of a burglary (§ 220, subd. (b)), attempted murder (§§ 664/187), making a criminal threat (§ 422), and assault with intent to commit rape (§ 220, subd. (a)). The jury also found true allegations that appellant had suffered a prior strike conviction (§§ 667, subds. (b) – (i), 1170.12, subd. (a)) and inflicted great bodily injury in committing the assault and attempted murder (§§ 12022.7, 12022.8). The trial court sentenced him to a state prison term of life plus 26 years. He contends (1) the evidence is insufficient to support his attempted murder conviction, and his trial attorney provided ineffective assistance in conceding the issue; (2) his conviction for assault with intent to commit rape must be set aside; (3) he was sentenced in violation of section 654; and (4)

[1] All further undesignated statutory references are to the Penal Code.

the court erred in concluding that he is not entitled to presentence conduct credits. We shall order appellant's conviction for assault with intent to commit rape set aside. We also order the judgment modified to reflect 511 days of presentence custody credit. Otherwise, we affirm.

STATEMENT OF FACTS

On July 27, 2007, J.Z. was moving out of her apartment in Northridge. At about 11:00 a.m., she was carrying several items to her car, which was parked in the alley outside the unlocked side gate to the apartment complex, when she saw appellant sitting nearby. When J.Z. returned carrying a television, appellant opened the gate for her. On her next trip from the apartment to her car, she did not see appellant. As she walked back to her apartment, however, she saw appellant sitting inside the complex on a nearby stairway. Appellant asked her if she needed help, and she responded, "No, thank you."

J.Z. went back inside her apartment and picked up another load. As she walked to her car, she noticed that appellant was no longer sitting on the stairs. Around that time, her boyfriend, Jaime C., called her cell phone and told her that he and her cousin, Jesse M., would be there soon to help her. J.Z. told Jaime C. to drive around the back of the complex, park in the alley, and come in through the side gate.

J.Z. returned to her apartment. As she was closing the door, appellant shoved it open, came inside the apartment, and locked the door. Appellant grabbed J.Z. by both arms just below her shoulders and shoved her. J.Z. said, "Please don't do this. My boyfriend is coming." Appellant responded, "Shut up, bitch." J.Z. asked appellant to stop and started yelling for help, and he said "shut up, bitch or I will kill you." When J.Z. struggled with appellant, he repeated, "Shut up, bitch. Shut up, bitch. I will kill you. Shut up."

Appellant said, "Let's go to the room" and started to push J.Z. toward her bedroom. J.Z. said, "No. Please, no" and started screaming. J.Z. fell to the floor, and appellant fell on top of her. J.Z. told appellant she could not walk because her leg was hurt. Appellant told her to take off her pants. He tried to unbutton her pants as he straddled her. When she screamed, he hit her and told her to shut up. He continued

trying to unbutton her pants with one hand as he held her down with the other, but was unsuccessful. He punched her in the face with his fist. Blood from J.Z.'s nose covered her face and eyes to the point she was unable to see.

J.Z. managed to turn over onto her stomach. Appellant then put his arm around her neck and began strangling her in a chokehold. J.Z. could not breathe and was afraid appellant was going to kill her, so she unbuttoned her jeans for him. Appellant pulled her pants down and repeatedly hit her on the side of the face.

In the meantime, Jaime C. and Jesse M. had parked in the alley and walked to J.Z.'s apartment. Jaime C. knocked on the door, then knocked again after no one answered. He heard what sounded like a struggle or "some kind of ruckus" coming from inside the apartment, then heard J.Z. scream "Jaime, open the door." Jaime C. and Jesse M. kicked down the door to find appellant on top of J.Z. with his arm around her neck. Appellant got up and ran for the door with his pants halfway down. Jaime C. grabbed appellant and held him while Jesse M. took J.Z. out into the hallway. Jesse M. returned to the apartment and helped Jaime C. subdue appellant while J.Z. called 911.

Los Angeles Police Officer James Hartmann responded to the call. When the officer arrived, J.Z. was sitting outside her apartment, "hysterical." Inside the apartment, the officer found Jaime C. on top of appellant. The officer handcuffed appellant and waited for backup.

Appellant asked Officer Hartmann if it was legal for "them" to beat him. When the officer asked appellant what he meant, he gestured toward a piece of wood from the broken door frame and said, "the guy tried to beat me with that." Officer Hartmann asked appellant why, and he responded, "Because I was trying to fuck the shit out of that girl."

J.Z. was taken to the hospital and treated for a broken nose and a sprained arm. Bruises were observed on her neck, arms, hip and legs, and there were scratches on her arms. Her mouth was swollen, and one of her ears was red and bloody. Prior to her release that day, she was advised to contact her personal physician to arrange for surgery to repair her nose.

When appellant was interviewed later that same day, he admitted that he forced his way into J.Z.'s apartment and pushed her to the ground. He also admitted that he tackled her, punched her in the face numerous times, and choked her. He stated that he was "[j]ust going to pull her pants down" and then "fuck her."

DISCUSSION

I.

Sufficiency of the Evidence and Ineffective Assistance of Counsel - Attempted Murder

Appellant contends the evidence is insufficient to support his conviction for attempted murder. He claims there is no evidence from which the jury could have found beyond a reasonable doubt that he intended to kill J.Z.. He also argues, by extension, that his trial attorney provided constitutionally ineffective assistance by conceding during closing argument that he was guilty of attempted murder. We reject both claims.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] . . . [A] reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

"'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Intent to kill may be "inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] . . . [Citation.]'" (*Id.* at p. 741.)

Substantial evidence supports the jury finding that appellant intended to kill J.Z. and was therefore guilty of attempted murder. Appellant violently attacked J.Z., expressly threatened to kill her if she did not "shut up," then strangled her in a chokehold when she did not do so. Strangulation reflects a deliberate intent to kill. (*People v. Frank* (1985) 38 Cal.3d 711, 733-734.) Appellant's assertion that the evidence essentially compels a finding that he only intended to rape J.Z. disregards the applicable standard of review.

Appellant also fails to show that his trial attorney provided ineffective assistance by conceding that he was guilty of attempted murder in his closing argument. To make such a showing, he would have to establish both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Appellant fails to prevail on either prong. It appears that counsel made a tactical decision to concede appellant's guilt in an effort to gain credibility with the jury. "It is within the permissible range of tactics for defense counsel to candidly recognize the weaknesses in the defense in closing argument. [Citations.]" (*People v. Jones* (1991) 53 Cal.3d 1115, 1150.) In conceding that appellant was guilty of attempted murder, counsel stated, "let's be honest, that happened." He then sought to persuade the jury that appellant should be found not guilty of assault with intent to commit rape during the commission of a burglary. Because the evidence of appellant's guilt was strong, it was reasonable for counsel to concede the issue in an effort to convince the jury that he was not guilty of the more serious offense. (*People v. Gurule* (2002) 28 Cal.4th 557, 612.) Moreover, in light of the evidence it is not reasonably probable the jury would have found appellant not guilty of attempted murder had counsel not conceded the issue. His claim of ineffective assistance accordingly fails. (*Strickland, supra*, at p. 687.)

II.

Lesser Included Offense

Appellant was convicted in count two of assault with intent to commit rape during the commission of a burglary (§ 220, subd. (b)), and in count five of assault with

intent to commit rape (§ 220, subd. (a)). Appellant contends, and the People concede, that the latter conviction must be set aside because section 220, subdivision (a) is a lesser included offense of section 220, subdivision (b). The People's concession is well taken. An offense is necessarily included within another when the statutory elements of the greater offense include all of the statutory elements of the lesser offense, or the facts alleged in the accusatory pleading include all of the elements of the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Subdivision (b) of section 220 contains all of the statutory elements of subdivision (a). Subdivision (b) merely adds the element that the assault must be committed during the commission of a burglary. Because appellant cannot be convicted of both crimes, we shall order the conviction of the lesser offense in count five to be set aside.

III.

Section 654

Appellant asserts that his consecutive sentence for attempted murder must be stayed under section 654. He claims the acts upon which that conviction is based were part of an indivisible course of conduct directed at one objective, i.e., the rape of J.Z.. We disagree.

Section 654 "prohibits multiple punishment if the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

As a general rule, the trial court determines the defendant's "'intent and objective'" under section 654 by a preponderance of the evidence. (*People v. Cleveland*

(2001) 87 Cal.App.4th 263, 266, 268-269.) "We review the court's determination of [appellant's] 'separate intents' for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*Id.* at p. 271.)

In concluding that consecutive sentencing was not prohibited by section 654, the court stated: "I do believe that there is no merge[r] and consecutive sentencing is appropriate because as the facts played out before the jury, there was initial actions by [appellant] which seemed clearly designed to accomplish a rape and certainly there was an assault involved in that. [¶] But as the testimony demonstrated to the court, . . . the victim in this mater, J.Z., upon resisting, it was then that she was subjected to the choking which the court would find was different in kind than the initial assaultive behavior and I believe there were statements made by the defendant threatening to kill the victim at this point in time for her failure to cooperate with his efforts to remove her clothes, and that it was at that point the choking happened and [he] only relented when she . . . showed a willingness to cooperate. So I don't think it's the same conduct . . . count 3 is the attempted murder that I just described is separate from the initial assault to commit rape which is count 2, and I do believe that under 667.6 a consecutive and full term is appropriate."

Substantial evidence supports the trial court's finding that appellant harbored independent objectives in committing attempted murder and the assault. Appellant started strangling J.Z. after she resisted his efforts to remove her pants and flipped over on her stomach. The court could infer from this that appellant was pursuing a different criminal objective when he attempted to murder J.Z. by strangling her. Separate punishment for the crime was thus proper.

IV.

Conduct Credits

In sentencing appellant, the trial court awarded 444 actual days of presentence custody credit. The court expressly declined, however, to award good conduct credits under section 2933.1. The court stated, "And on these charges is [appellant] eligible for any [good conduct] custody credits? No." Defense counsel did not disagree with this assessment.

In a supplemental brief filed before the People filed their respondent's brief, appellant contends he is entitled to an additional 67 days of good conduct credit under presentence custody credit under section 2933.1, which consists of 15 percent of his 444 days of actual custody. The People did not respond to this issue in their brief.

Appellant's contention appears to have merit. We are unable to find any reason why he would not be entitled to the additional credits. He was not convicted of murder (§ 2933.2), or any of the other offenses that are rendered ineligible for conduct credits (§§ 664, subd. (f), 2933.5). Moreover, the People have effectively conceded the issue by failing to respond. Appellant is therefore entitled to an additional 67 days of credit. We shall order the judgment so modified.

DISPOSITION

Appellant's conviction on count five (assault with intent to commit rape) is ordered stricken. The judgment is also modified to reflect 511 days of presentence custody credit, consisting of 444 days of actual custody credit plus 67 days of conduct credit. The trial court shall amend the abstract of judgment accordingly and forward the

amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Barbara M. Scheper, Judge

Superior Court County of Los Angeles

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.